THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

Verizon New England, Inc.

v.

City of Rochester
Docket no. 05-E-400, 401, & 402
ORDER

This case has a lengthy and well-litigated history. See Verizon New England, Inc. v. City of Rochester, 151 N.H. 263 (2004); New England Tel. & Tel. Co. v. City of Rochester, 144 N.H. 118 (1999); New England Tel. & Tel. Co. v. City of Franklin, 141 N.H. 449 (1996). To summarize briefly for purposes of this order, Rochester seeks to impose real estate taxes on Verizon for the public property used and occupied by its poles and wires. RSA 72:23, I. Verizon contends that Rochester's selective imposition of the tax against Verizon alone violates its equal protection rights. Alternatively, if the application of the tax is ruled constitutional, Verizon seeks abatement. The trial of this matter took place from September 18 through September 21, 2006.

Equal Protection

The court has previously ruled in response to the parties' cross-motions for summary judgment that RSA 72:23, I, is not facially unconstitutional, Order dated July 25, 2006, leaving open the question whether the tax "as applied" by Rochester violates Verizon's equal protection rights.

The statute declares that "real or personal property [situated on public property] used or occupied by other than the state or a city, town, school district, or village district under a lease or other agreement the terms of which provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property" is "not exempt from taxation." RSA 72:23, I(a) (emphasis supplied). Section (b) of the statute mandates that "[a]ll leases and other agreements, the terms of which provide for the use or occupation by others of real or personal property owned by the state or a city, town, school district, or village district ... shall provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property." RSA 72:23, I(b) (emphasis supplied).

Public ways host a variety of "occupations and uses." Citizens use them for travel and occupy them for short and long-term parking. Businesses similarly use and occupy public ways to transport and deliver goods. Utilities use and occupy public ways to deliver their services: telephone, cable, water, sewer, electricity, and natural gas.

The experts presented by both parties all employed the same basic formula to arrive at a fair market value of Verizon's use and occupation of public ways. The formula consists of five calculations. Obviously, the variables each expert selected and the weight he attributed to them differed widely. The steps are:

1) Calculate the length of Verizon's cables, wires and conduits over and under the ground;

2) Estimate the extent (width) of the corridor "used and occupied" by Verizon's poles, wires, cables, and conduits;

3) Multiply items one and two to arrive at the total acreage "used and occupied";

4) Assess value using the "across the fence" method, which basically calculates the fair market value of the corridor by using the comparable value of property abutting it; and,

5) Estimate the percentage of Verizon's "use and occupation" of the corridor and value accordingly.

For example, Rochester's assessor, Brett Purvis, calculated Verizon's "use and occupation" of the public way to be a corridor 25 feet in width. He multiplied 25 feet by the number of road and street miles within Rochester, 185.6, to arrive at 558.9 acres. Exs. 22, X, and Y. He calculated the value of the total acreage "used or occupied" by the "across the fence" method. Ex. G. Then, acknowledging, as he must, that a number of other entities "use or occupy" this corridor, Purvis estimated Verizon's use to be a third and reduced its total assessment by two-thirds.

Without getting into the specifics of each appraiser's approach and choice of factors, it is significant that each expert, in step 5, recognizes that public ways have a number of users, and that the utility corridor used and occupied by Verizon is also used and occupied by other companies.

Despite the statute compelling a municipality not to exempt from taxation any entity that uses or occupies public property under a lease or other agreement, Rochester has only levied the tax on Verizon. RSA 72:23, I. Rochester has an explanation of why it has not imposed this tax on other users and occupiers of this corridor. For electric and gas companies, Rochester contends

that these companies, unlike Verizon, pay a similar tax pursuant to RSA 72:8, which reads:[1]

> All structures, machinery, dynamos, apparatus, poles, wires, fixtures of all kinds and descriptions, and pipe lines employed in the generation, production, supply, distribution, transmission, or transportation of electric power or natural gas, crude petroleum and refined petroleum products or combinations thereof, shall be taxed as real estate in the town in which said property or any part of it is situated....

RSA 72:8 authorizes taxation of personal property, fixtures, and equipment, but not land. RSA 72:23, I, taxes any person's "use and occupation" of public property. The property taxed could not be more different. Nevertheless, Rochester offers no evidence or law to support its position that RSA 72:8 somehow incorporates the tax imposed by RSA 72:23, I, other than a conversation its assessor had with a representative of the Department for Revenue Administration. Moreover, contrary to Rochester's contention that a portion of the tax it imposes pursuant to RSA 72:8 includes the use and occupation of public lands, the electric and gas companies' tax bills describe their taxable property as "Building" only. Ex. 1.

The cable television company is in a different situation. Federal law allows it to use Verizon's poles in exchange for merely contributing to the poles' upkeep and maintenance. 47 U.S.C. § 224(d). Other than not owning its poles, the cable company's use and occupation of public ways is physically and legally identical to Verizon's. Ex. 2, Franchise Agreement, sec. 2.1, 2.2, and 2.8.

As part of its remand order the Supreme Court directed this court to "apply the rational basis test" in conducting its equal application analysis. Verizon New England, Inc. v. City of Rochester, 151 N.H. 263, 271 (2004). Having applied the rational basis test to RSA 72:23, I, this court previously ruled that the statute is facially constitutional. The question remains whether the "city's ... issu[ing] real estate tax assessments to Verizon, but not to the gas, cable and electric companies that use the public ways in a manner indistinguishable from Verizon's ... violat[es] its right to equal protection." Id. at 270.

Verizon claims there is no rational basis to single it out for taxation under RSA 72:23, I, when other utilities use and occupy the same corridor without

[1] A sister statute imposes a similar tax on poles, towers, and conduits. RSA 72:8-a. However, any retailer of communication services, Verizon for example, which pays a communication services tax, is exempted. RSA 72:8-b; RSA ch. 82-A.

taxation. There are no substantive differences in the manner other utilities use and occupy the public ways. Each supplies a public service to citizens over and under the roads and streets of Rochester. In order to do so, each must obtain Rochester's permission. There is no rational basis by which to distinguish these utilities, nor is there any legitimate "governmental interest" justifying their disparate treatment. Verizon at 270.

Rochester counters that Verizon is the only utility which uses and occupies the public ways pursuant to a "*lease or other agreement* providing for the payment of properly assessed real and property taxes by the party using or occupying said property." RSA 72:23, I(a) (emphasis supplied). This argument does not stand up to scrutiny.

The electric company holds licenses identical to Verizon's, the only exception being that Rochester did not insert language into its licenses requiring it to pay real estate taxes, which RSA 72:23, I(b), mandates. RSA 231:159 through 182. Gas companies may use and occupy public ways only with "the consent of ... the mayor and aldermen or street commissioner of the city." RSA 231:185. Instead of pole licenses, the cable television company has a franchise agreement with Rochester entitling it to operate within the City and to use and occupy the public ways in exchange for a franchise fee. Ex. 2, sec. 2.5.

In New England Tel. & Tel. Co. v. City of Rochester the Supreme Court defined "agreement," as that word is used in RSA 72:23, I(a), according to its generally understood meaning. An agreement was explained as a "harmonious understanding" or "the act of agreeing or coming to a mutual arrangement." New England Tel. & Tel. Co. v. City of Rochester, 144 N.H. 118, 121 (1999). Each of these companies' arrangements with Rochester allowing them to use and occupy public ways, however titled, are in effect agreements.

The fact that Rochester only inserted a provision in Verizon's pole licenses requiring it to pay taxes pursuant to RSA 72:23, I, does not excuse unequal treatment. The statute mandates Rochester to include a provision in every agreement requiring "the payment of properly assessed real and personal property taxes by the party using or occupying said [public] property." RSA 72:23, I(b). The electric, cable television, and gas companies all have agreements of one sort or another entitling them to use or occupy public ways within Rochester. Their use or occupation is identical to Verizon's, yet Rochester has singled out Verizon as the only utility to pay the tax. This is both contrary to statute and discriminatory.

For these reasons Rochester's taxation of only Verizon for its use and occupation of public property pursuant to RSA 72:23, I, violates Verizon's right to equal protection and is unconstitutional.

Abatement

The above ruling declaring unconstitutional Rochester's imposition of this tax only against Verizon makes further findings and rulings unnecessary. Nevertheless, if history is any guide, this case will definitely be appealed. In the interests of trying to bring this matter to a close for the benefit of the parties and other interested observers, this order will address the fair market value of Verizon's use and occupation of Rochester's public property.

The primary purpose of public highways and the reason they were laid out and acquired is viatic, as they enable the public to travel readily and conveniently. Later, with the advent of water, sewer, gas, electricity, and telephones, roads became a natural corridor over and under which to run pipes and wires to supply these services. In recognition of their secondary status to the primary viatic use of the public ways, licenses and permits were required by the appropriate governmental agency prior to the installation of pipes, poles, wires, and conduit. Even though for years these utilities have enjoyed basically free use of public land in exchange for delivering their services, the right to use and occupy a public way has taxable value.

Utility poles can vary in height but the consensus was they average forty feet. The poles are located as far off a traveled way as possible while still within the public highway. If Rochester dislikes where the pole is set, it may order it moved. The poles are placed approximately one hundred and fifty feet apart. The first six vertical feet are buried. The next eighteen vertical feet must be left vacant to allow unencumbered viatic use of the road. The next five feet, eight inches, is reserved for telecommunications, including Verizon's local competitors. The next forty inches are dedicated to cable companies and municipal and other public communications. The top seven feet are used by the electric company, including the cross ties. Ex. 44.

Although the shadow cast by poles and wires is slender, Verizon and the electric company need to maintain the poles and wires, which includes bringing equipment onto the public way, attaching guy or support wires, and trimming brush or trees. According to Verizon's records, annually 2.4 % of its poles are replaced or new and 1.2 % of its wire is replaced or new. It trims brush and trees eight feet on both sides of its poles and wires. Ex. L at VER513-14. Obviously these tasks involve the use of service vans and trucks, some with aerial lifts and large

augers. Where it must acquire an easement from a private landowner, Verizon insists on a width of ten to twenty feet.

Verizon calculates it has 6908 poles in Rochester that are on average 150 feet apart, which when multiplied together establish that its wires cover a distance of approximately 196.25 miles.[2] Ex. 35 and Ex. 34, Appraisal of John M. Crafts at 12.

Verizon's conduits in the downtown area, which are also shared with cable and other telecommunication wires, travel approximately 11 miles.[3] To service these conduits Verizon has seventy-two manhole covers that occupy a surface area of twelve square feet and are six or seven feet in depth. In rural areas Verizon may bury cable without a conduit. Those buried wires, whose diameters vary, are approximately 50 miles in length. Ex. 34 at 13. However, what percentage of buried cables is on State or private land is unknown. Neither side provided any guidance in this regard. As a result, for purposes of this exercise, the court will assume that approximately half of the buried cable is on public property.

Obviously the width or extent of Verizon's use and occupation of the public way is a critical variable. The larger the width of the corridor, the greater the acreage used and occupied by Verizon. Thus, Rochester's assessor used twenty-five feet for the width of the corridor used and occupied by Verizon. On the other hand, John Crafts, Verizon's expert, employed merely the diameter of the wires and conduit to calculate the area occupied by Verizon. Thus Rochester arrives at 559 acres and Verizon came to 3.5 acres.

This disagreement is related to how the parties perceive the use of the public way to maintain and service Verizon's poles, wires, and conduits. Rochester asserts that Verizon requires access to a corridor at least 25 feet width to service its poles, wires, and conduits. On the other hand, Crafts calculated only the land, air, and underground space actually "occupied" by Verizon's wires, poles, and conduits, and gives no weight to Verizon's right to "use" the public way, contending that this right to "use" the streets and road is essentially

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[2] Rochester's assessor estimated the length of Rochester's public ways to be 185.6 miles. Verizon estimated the length of its wires by using the average distance of 150 feet between poles. The discrepancy may be due to wires that diagonally cross streets to reach the next pole, the hypotenuse of the wire being longer than the section of street it crosses. Regardless, both estimates are rough approximations.

[3] 58,044 feet ÷ 5280 feet = 11 miles. Ex. Z at 10 (pages unnumbered).

identical to the public's right. However, this ignores the legislature's intent to include that portion of public property "used or occupied" as taxable property. Its employment of the conjunction "or" has to be presumed intentional. Therefore, contrary to Crafts' analysis, some value must be ascribed to Verizon's use of the property.

Obviously, the intensity and frequency of Verizon's "use" of the public way diminishes the farther away one is from the actual wire, pole, or conduit. For example, brush, which can be trimmed up to eight feet on either side of wires and poles, may be trimmed infrequently or, if there is no brush, not at all, while the poles and wires require fairly frequent repairs and maintenance. Ex. 18. Thus, the closer one gets to the actual poles and wires, to the center of the corridor, the more intense and frequent becomes Verizon's "use." To take this image to its extreme, ultimately Verizon's wires and poles physically "occupy" a small amount of space to the exclusion of anything else. Thus, the selection of the width of the corridor demands an evaluation of the physical space used and the frequency of that use. Is it permanent, frequent, occasional, infrequent, rare, or never? Considering the width of Verizon's trucks, the frequency of their "use" of the public way, the extent and length of their "use," the court selects a corridor of fifteen feet in width for poles and wires and ten feet for buried conduit and wires.[4] The smaller corridor width for buried conduit and cable reflects that servicing and repairing buried wires is less frequent and uses less space. Using these widths, Verizon uses and occupies a total of approximately 400 acres of public land.[5]

Having calculated the total acreage used and occupied by Verizon, the next step is to value the property using the generally accepted "across the fence" method. The court finds Crafts' calculation of the land value to be more accurate and preferable to Rochester's experts. Crafts divided Rochester into two districts, residential and commercial/industrial. Next he calculated what portion of the poles, wires, conduit, and buried cable was in these two districts. Utilizing the MS-1 for 1996 (Ex. 36) he found the average assessment in residential areas was $15,075 per acre and $22,159 in commercial/industrial areas. Crafts

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[4] Factored into the court's analysis as a part of this corridor is the physical area occupied by Verizon's poles and manhole covers. Analyzing Verizon's use and occupation as a utility corridor over, across, and under public ways without counting every manhole cover and pole, especially where their number and position is typical, provides a standardized methodology, is well-accepted in the assessing field, and increases uniformity and predictability.

[5] Poles and wires: 196.25 miles x 5280 feet x 15 feet ÷ 43560 square feet = 356.82 acres; Conduit (11 miles) and buried cable (25 miles): 36 miles x 5280 feet x 10 feet ÷ 43560 square feet = 43.64 acres.

did not include land held in current use in his calculations of across the fence value. Doing so would have reduced the final per acre value. Rochester's appraisers, not inappropriately, created more districts, calculating their per acre value from recent sales. Ex. 15. However, this approach creates multiple variables that are difficult to confirm and is unnecessarily complicated. Crafts' method evens out any discrepancies by taking the average assessment per acre of larger districts. In some locations his valuations may be lower and in other areas higher than Rochester's, but overall his approach leads to more consistent and predictable results.

All buried cable is located in residential districts. Its total value is $456,773.[6]

All underground conduits are in commercial/industrial areas and have a value of $295,453.[7]

Aerial cable crosses both residential and commercial/industrial areas. There are 25,522 acres of land in Rochester, consisting of 11,211 acres in current use, 9,926 acres in residential areas, and 4,386 commercial/industrial acres. Ex. 36. Residential areas (including land in current use) make up eighty-three percent (83%) of Rochester's landmass while commercial/industrial areas constitute the balance, seventeen percent (17%). Within the commercial/industrial area Verizon's underground conduits and aboveground poles and wires often use and occupy the same corridor, resulting in double-counting the land Verizon uses and occupies. The court has addressed this factor in the percentage reductions it applies, discussed below. Thus, the total value of the land used and occupied by Verizon's poles and wires is $5,808,777.[8]

Adding these three figures comes to $6,561,003, which is the total fair market value of the public ways that Verizon uses and occupies. However, this value far overstates the actual fair market value of Verizon's use and occupation. First, it assumes that Verizon has fee simple ownership of this area, and second that Verizon does not share the corridor with anyone else. Neither is true.

Verizon possesses only licenses or permits for its poles, wires, buried cable, and conduit. Those licenses are temporary, with a term of one year. RSA 231:161,

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[6] 25 miles x 5280 feet x 10 feet ÷ 43560 square feet = 30.3 acres x $15,075 = $456,773.

[7] 11 miles x 5280 feet x 10 feet ÷ 43560 square feet = 43.03 acres x $22,159 = $295,453.

[8] 356.82 total acres x .83 percent in residential areas x $15,075 per acre = $4,464,612; 33.25 commercial acres x $22,159 per acre = $1,344,165.

II. Moreover, a license holder is prohibited from ever acquiring any interest in the land. RSA 231:174. Because the primary use and purpose of roads and streets is viatic, Verizon must erect new poles so that they "will not interfere with the safe, free and convenient use for public travel of the highway...." RSA 231:168. And finally replacement poles cannot be located within "20 feet from the surfaced edge or edge of public easement" without a waiver. RSA 231:161, II. Verizon's license rights are a long way from fee simple ownership.

Although licenses for poles and wires are not easements, within the context of this case they have similar attributes. Both allow the holder or owner to use another's property for their purposes. Although licenses for poles and wires are temporary, telephone and electric companies have enjoyed uninterrupted use and occupancy of public ways for over a hundred years. And like easements and unlike a typical license, these may be transferred. RSA 231:170. It is also worth noting that an easement is what Verizon acquires when its poles and wires cross private property.

Having said this, by analogy it is worthwhile to consider how easements are appraised. "When easements are valued, the value of the easement interest is added to the estate of the easement holder and a corresponding reduction is made to the value of the underlying fee." Tennessee Gas Pipeline Co. v. Town of Hudson, 145 N.H. 598, 603 (2000). Thus, one of Verizon's experts concluded that any value of the public land used and occupied by poles and licenses is reflected in the increased value of the abutting land which is serviced thereby. Stated differently, taxing a utility for the public land it uses and occupies and also taxing the increased value those services confer on benefiting property results in a double taxation. It is comparable to taxing the easement while not deducting its value from the dominant estate. See Locke Lake Colony Ass'n v. Town of Barnstead, 126 N.H. 136, 141 (1985). Although this proposition has considerable logic, Verizon has not proven it to the court's satisfaction.

Another way to look at valuation is to analyze how easements are valued in eminent domain cases. There, the value of an easement is the difference between the value of the property before the easement and the value afterwards. Olson v. United States, 292 U.S. 246 (1934). In this case the value of the public ways is diminished little by the presence of poles and wires. As an example, Verizon's expert, Karl Norwood, points out that developers willingly donate easements to utilities in return for gaining the benefit of their services.

Another of Verizon's experts, Crafts, applied an interesting approach. He noted that wires, conduit, and cables are run underground or overhead. Using accepted appraising techniques, he figured ground floor space to constitute

fifty percent of the total value of a typical building, the basement to represent twenty percent of value, and second and third story, fifteen percent each. Again, although not the approach the court adopted, it does supply a helpful way to analyze the degree of Verizon's use and occupy of public ways can be valued.

Ultimately, the court prefers the approach that Rochester's appraisers and Albert Allen, one of Verizon's experts, took. Instead of breaking down the use and occupancy that poles, wires, conduit, manhole covers, cables make of the public ways into a number of component parts, they assessed it as a whole, as a utility corridor. Then, each reduced Verizon's ownership interest by a percentage. Allen used ninety-nine percent; Rochester's experts applied a sixty-seven percent reduction.

A better approach is to divide the reduction into two parts. First, the utility corridor that the court valued at $6,561,003 assumes fee simple ownership, when Verizon's use and occupancy is more akin to an easement, because it interferes little with the primary viatic use of the public ways and detracts little from its value. Consequently, at best the utility corridor reduces the value of the land that it uses and occupies by ten percent. Or stated another way, after the easement is imposed, ninety percent of the value of the servient estate remains. This reduces the value of the utility corridor to $656,100.[9]

However, as was noted above, the utility corridor serves other utilities, including the electric company, the cable television company, Verizon's competitors, and other entities. Every expert recognized that Verizon's non-exclusive use of this utility corridor justifies a reduction. That being the case, the court would apply the same percentage that Rochester's experts applied to their corridor, two-thirds. To reflect other companies' use and occupation of the utility corridor, the remaining value of the utility corridor is reduced by two-thirds, leaving Verizon's interest at one-third, or $218,700.[10]

Thus, the court concludes that as of April 1, 1996, the market value of the public land used or occupied by Verizon for real estate tax purposes was $218,700. For the tax year 1996 Rochester's equalization ratio was one-hundred percent. Ex. I. Verizon owns five other properties in Rochester, the assessments of which it does not contest. However, if Rochester's assessment of Verizon's use or occupancy of the public ways is not reduced, as the court had done so,

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[9] $6,561,003 x .10 = $656,100.

[10] $656,100 x .33 = $218,700.

Verizon's entire property tax in Rochester would be considerably more than its proportionate share. The court assumes with these findings counsel can agree upon Verizon's correct assessments for the tax years after 1996.

Rulings on Verizon's requests for findings of fact:

Granted: 1-23, 25-28, 32, 33, 35-37, 46-63 (These accurately reflect their opinions and the trial court's previous findings; see narrative findings), 64-75, 76-79 (These accurately reflect his conclusions; see narrative findings), 80, 83, 84; and,

Denied: 24 and 31 (he offered "backup," although it was impossible to confirm), 29 and 30 (unknown), 34, 81 (see narrative findings), and 82.

Rulings on Verizon's requests for rulings of law:

Granted: 3-5, 7, 10, 13; and,

Denied: 1 and 2 (see narrative rulings), 6, 8, 9 (see narrative rulings), 11-12 (see narrative rulings), and 14.

Rulings on Rochester's requests for findings or facts and rulings of law:

Granted: 1-9, 10 (however, both are "mutual arrangements" constituting "other agreements"), 16-35, 36 (strike "significant"), 37, 38 (substitute "may at times" for "consistently"), 39-45, 48-51, 53, 54, 62 (substitute "at times" for "often"), 63-68, 70-72, 74-78, 82-83, 85; and,

Denied: 11 (although that is what he testified), 12-15, 46-47 (see narrative findings), 52, 55-61 (see narrative findings), 69, 73, 79-81, 84, 86, and 87.

All of the State of New Hampshire's requests for proposed findings and conclusions of law are granted except 16 to the extent it contradicts the rulings in this order.

November 9, 2006

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Robert E.K. Morrill
Presiding Justice